In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-9

EVELLE J. YOUNGER, et al., *Appellants,*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR THE APPELLANTS

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APPELLANTS' REPLY ARGUMENT

I

THE CONSTITUTION IMPOSES NO DUTY UPON STATE PRISON OFFICIALS TO FURNISH INMATES WITH EXTENSIVE LAW LIBRARIES OR THE SERVICES OF LAWYERS OR LAW STUDENTS FOR THE PREPARATION OF POST-CONVICTION PETITIONS OR CIVIL RIGHTS ACT COMPLAINTS.

In an attempt to magnify the importance of post-conviction proceedings in California, amici curiae begin their argument with the misleading representation that California's convicted felons are not advised of

their right to appeal their convictions, and to do so at state expense. This representation is followed by an assertion that the right to appeal is commonly lost through the defendant's ignorance.

Although at present there is no requirement for advising a convicted defendant of his appeal rights, no rights are lost by virtue of the absence of such a requirement. Contrary to the representation of amici (Brief for Amici Curiae 8), California law allows relief from late filing of notice of appeal upon manifold grounds, including the defendant's ignorance of his appeal rights. *People v. Acosta,* 71 Cal.2d 683, 456 P. 2d 136 (1969). (This case was decided two months after *Still v. Fitzharris,* 413 F.2d 977 (9th Cir. 1969), cited by amici.) And when notice of appeal has been filed and the trial record reaches the appellate court, the clerk of that court uniformly notifies the appellant of his right to appointed counsel if indigent.

For what it may be worth, we note that the Judicial Council of the State of California has recognized the possibility of more direct ways to avoid loss of the right to appeal through ignorance, and has proposed amendments to the California Rules of Court which would require trial judges, upon imposition of judgment, to advise convicted defendants of their right to appeal at public expense. *See* 46 J.S.B. Cal. 530-31, 536-37 (1971).

In arguing that the failure of the state to provide inmates with large law libraries or alternative legal services denies them access to the courts, amici place primary reliance on *Boddie v. Connecticut,* 401 U.S.

371 (1971). This decision, we submit, offers no support at all for the contention of amici. In the *Boddie* opinion, this Court characterized the rights complained of by appellants therein as the rights of "access to the courts" (401 U.S. at 372, 374, 375, 376) and a "meaningful opportunity to be heard" (*Id.* at 377, 378, 379). Those rights were held to be denied by a requirement that indigents pay filing fees in order to secure a divorce. Nothing in the opinion mentions the assistance of counsel (or use of lawbooks) as necessary to vindicate these rights. Rather, the denial of the rights of "access to the courts" and a "meaningful opportunity to be heard" was found to lie in the fact that the state rules precluded inmates from getting into court. By implicitly defining "access to the courts" as the right to get into court, this Court, it would appear, has implicitly adopted our position that the state's duty toward its indigents to grant them access to the courts consists only in removing barriers between indigent and court. Since the only claimed restriction which appellants herein were found to place in the way of "access to the courts" lies in the state's alleged failure to provide means for improving the quality of inmate legal pleadings, there has been no infringement of the right of "access to the courts" as that concept was treated in *Boddie*.

Amici also rely upon an out-of-context quotation from an opinion by Mr. Justice Black, dissenting from denial of review in *Meltzer v. G. Buck LeCraw & Co.*, 402 U.S. 954 (1971): "[T]here cannot be meaningful access to the judicial process until every serious liti-

gant is represented by competent counsel." *Id.* at 959. But Mr. Justice Black went on to say, immediately thereafter, "Of course, not every litigant would be entitled to appointed counsel no matter how frivolous his claims might be." *Id.* We submit that the California procedure, whereby counsel is appointed when a prison inmate seeking post-conviction relief has presented a prima facie case for relief, *People v. Shipman,* 62 Cal.2d 226, 397 P.2d 993 (1965), gives expression to Mr. Justice Black's view of the Constitution by weeding out frivolous petitions and appointing counsel in cases which may have some merit.

The equal protection arguments advanced by amici constitute a veritable school of red herring. It is first argued that indigent prison inmates are denied equal protection vis-a-vis those convicted of felonies but placed on probation. The latter are stated to have the opportunity to earn money with which to hire attorneys, and the ability to use public law libraries. This is true, but irrelevant. For probationers rarely take advantage of these opportunities collaterally to attack their convictions. Prison walls seem to provide an impetus for convicted felons to file actions for post-conviction relief not present in their counterparts on conditional liberty. We can recall only two cases in which a felony probationer has instituted proceedings collaterally attacking his conviction, and one of those cases involved a judge who had been convicted of felony and who thus had an unusual interest in overturning his conviction. Undoubtedly, there have been other cases, but we submit that it is a proper subject

for judicial notice that such cases represent at most an insignificant fraction of post-conviction proceedings.

We are indebted to amici for the reductio ad absurdum of the equal protection doctrine—that as long as there exists *any* state prison inmate (italics amici's) who has the financial resources to retain an attorney to prepare a post-conviction petition, the state must provide attorneys for all indigent inmates. Brief for Amici Curiae 31.

According to the arguments of both amici and appellees, the achievements or good fortune of the few are the standard up to which, to achieve equal protection, the many must be brought in their dealings with the state. Precisely the same reasoning would dictate that the state furnish legislative lobbyists and special pleaders before the executive branch of government for anyone who desires but cannot afford them, since such lobbyists and pleaders are employed by large corporations, powerful associations, and wealthy individuals.

The argument is a sham. Any workable view of the Fourteenth Amendment requires, as a condition precedent to a finding of denial of equal protection, a clear showing that a group of citizens is, by reason of poverty or otherwise, disadvantaged in its relations with the state vis-a-vis a distinct and substantial minority (or majority) of its fellow citizens. No such showing is made by hypothecating the existence of a few affluent individuals and arguing that their indigent counterparts must be given, at public expense,

equivalent advantages. As noted in our earlier Brief, full equality for all citizens is not attainable, and the quest for equality must at some point yield to considerations of practicality. Lines can be and are drawn, and this Court often sustains them. *Douglas v. California,* 372 U.S. 353, 357 (1963). California provides indigents with appointed counsel at trial and on appeal, and on petitions for collateral relief when some showing of possible merit has been made. California has drawn the line at providing indigent felons, at state expense, with lawyers or large libraries in an effort to attack convictions carrying a strong presumption of validity. We submit that this drawing of the line is reasonable under the equal protection clause.

The Court below listed three alternatives for complying with its mandate: installing large law libraries in each correctional institution in California; providing inmates with the assistance of law students; or providing them with lawyers to draft their petitions. None of the alternatives is practicable.

Law libraries are no solution. They are expensive, and could not be provided from the fiscal resources available to appellants. Even more to the point, however, they would be nearly useless. We pointed out at some length in our earlier Brief that inmates are ill-equipped to use lawbooks. These tools of the lawyer's trade are not, in the colorful language of appellees, "amulets," but they are tools the use of which requires intensive training, and which untrained laymen are no more able to use properly than the tools of a surgeon. Neither appellees nor amici have seri-

ously challenged this plain fact. Amici go so far as to rely upon "the general illiteracy, lack of education and intelligence in prisons. . . ." (Brief for Amici Curiae 25.) The court below, which neither heard nor was offered any evidence at all on any subject, made liberal use of "judicial notice," but did not judicially notice that prison inmates have, in any significant numbers, the competence to make effective use of the lawbooks it "suggested" appellants provide. If the matter is a proper subject for judicial notice, this Court should notice that extensive law libraries would not provide sufficient assistance to inmates to outweigh the expense of installing and maintaining them in state correctional institutions.

This leaves law students and lawyers. The benefits of a program whereby law students assist prisoners with the preparation and filing of habeas corpus and other petitions have been judically resognized. *See United States v. Simpson,* 436 F.2d 163 (D.C. Cir. 1970). Under such a program, the law student gains invaluable experience, the inmate receives dedicated, energetic, and reasonably competent assistance, and the courts and attorneys for responding parties receive the benefit of generally well-drafted petitions, all at little or no expense to the state. We fully agree that such programs should be encouraged. Accordingly, as the record shows, it has been the policy of the California Department of Corrections for nearly five years to endeavor to set up such programs in the various correctional institutions (App. 70). We have discussed the matter with law school administra-

tors, attorneys seeking to sponsor such projects, and even individual law students. But our continuing efforts have produced meagre results. Only a few law students have been available, and could assist only a few inmates. Whether our inability, to date, to secure effective implementation of a law-student assistance program is attributable to lack of avaliable student time, lack of student interest, or geography (few of the state's correctional institutions are reasonably accessible to any law school) is not clear. But law students are not subject to conscription for this purpose. Regardless of the disposition of the instant litigation, we will continue to attempt to implement law-student assistance programs, but our lack of success to this point disables us from representing to this Court or the court below that such programs represent a feasible method of providing legal assistance to inmates.

This leaves lawyers. We would be less than candid if we did not admit that lawyers, unlike lawbooks, would be of some assistance to inmates. At the same time, their value could easily be overestimated. The presumption of validity of a conviction which has been affirmed on appeal is extremely strong, and even the best attorney has difficulty in making a silk purse out of a sow's ear. Furthermore, as we pointed out in our earlier Brief, the task of setting forth a simple statement of facts, which is all an inmate need do to get a hearing, with counsel, is one at which the lawyer is not significantly more adept than the inmate, or at least than the "jailhouse lawyer" to which all inmates presumably have access under *Johnson v. Avery*, 393 U.S. 483 (1969). But lawyers do tend to

write with some clarity, and on occasion a lawyer might ferret out a claim which would otherwise go undiscovered.

But providing lawyers to draft petitions for all inmates who want them is the least practicable alternative of all. There are simply not enough lawyers. Mr. Justice Mosk of the California Supreme Court recently discussed the insuperable problems that would be involved in an attempt to provide attorneys for the limited purpose of representing prisoners at parole hearings.

> "Not one prison is located in any of the nine most populous counties in the state, the counties in which the greater number of members of the bar practice. The supply of counsel, limited as it is, does not exist where the demand would be.[5]
>
> ". . . [I]n these past eight years the increased demands upon the legal profession—only a small percentage of which is skilled in the criminal law—have been overwhelming. Public defenders are inundated with cases, and court-appointed counsel are harried. The quality of work has been reflected in the not infrequent dubious quality of service rendered; petitions to reviewing courts on grounds of inadequate representation have multiplied many times. . . ."
>
> ". . . 'The vast expansion of the Sixth Amendment's right to counsel has created an immense burden on the organized bar. Legal Aid and Pub-

[5]There are 2,220 inmates at the California Conservation Center, located at Susanville, 293 miles northeast of the metropolitan Bay Area. In all of Lassen County there are eight members of the State Bar. One of those members is the district attorney.

lic Defender programs, while multiplying with great rapidity, have not been able to scratch the surface of the need for qualified defense lawyers. The last of Gideon's progeny has certainly not yet been seen. . . ." (Read, *Lawyers at Lineups* (1969) 17 U.C.L.A. L.Rev. 339, 377.)

"There are three alternatives to this unfolding dilemma. The first is to increase our supply of lawyers. This is eminently desirable, but obviously any recruitment program by law schools will not be felt for some years. The second is to permit unlicensed practice of the law. To a limited extent this was permitted by the United State Supreme Court in *Johnson v. Avery* (1969) 393 U.S. 483 . . . , but on any expansive scale such practice would clearly be counterproductive. The third alternative, necessary for the present, is to avoid judicially extending the required presence of hired or appointed counsel beyond the areas compelled by the Constitution. At such time as the numerous practical problems appear ripe for solution, primarily the availability of attorneys in sufficient numbers, we can anticipate adoption of appropriate procedures by the Legislature." *In re Tucker,* 5 Cal.3d 171, 183-84, 486 P. 2d 657, 663-64 (1971) (separate opinion).

The sheer impracticability of providing lawyers to draft post-conviction petitions for any inmate wanting them is, if not self-evident, at least made clear by Justice Mosk's exposition.

Amici seem to suggest that the problem could be solved if California adopted some variant of the Uniform Post-Conviction Procedure Act, 9 U.L.A. 541. The Act provides for appointment of counsel *after*

the filing of a petition (in Maine, only after filing of a meritorious petition, Me. Rev. Stat. Ann. tit. 14, §§ 5506, 5507 (1965); *Brine v. State*, 160 Me. 401, 205 A.2d 12 (1964)). The Uniform Act itself does not give appointed counsel authority to amend the petition, but perhaps such authority is implied. At all events, in at least Missouri and Illinois, counsel is required to seek out unalleged grounds for relief and, if appropriate, amend the petition. *See* Brief for Amici Curiae 27 n.22. But for the benefits of appointed counsel, the petitioner under the Act sacrifices the opportunity to present repeated petitions—unless a new ground for relief is alleged which could not have been raised on the first petition, the petitioner gets only "one bite of the apple." See Section 8 of the Uniform Act. Whether the adoption of such a statute would work a net benefit to defendants or the state is certainly a proper legislative question. But there is no warrant for deeming such a statute to be constitutionally required.

And the Act provides for no representation at all in federal proceedings. Whatever merit there might be in enacting a statute appointing counsel on request for the purpose of drafting a federal habeas petition for a state prisoner, the statute would be unworkable if it could be abused by being invoked for an endless succession of petitions. Absent appropriate federal legislation, such abuse would be widespread and would cripple any program for the appointment of counsel.

In sum, to whatever extent legal assistance to prisoners in the drafting of their petitions might be de-

sirable, no feasible method of providing it can be found. The determination of whether a new constitutional right is to be promulgated must necessarily take into consideration the feasibility of vindicating such a right. We submit that the State of California has already done everything practicable to secure legal assistance to its prisoners, and the Constitution requires it to do no more.

II

THE ORDER OF THE DISTRICT COURT IS BARRED BY THE ELEVENTH AMENDMENT

Appellees and amici have raised no serious challenge to our Eleventh Amendment argument. Amici content themselves with citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); and *Reynolds v. Sims*, 377 U.S. 533 (1964), as examples of cases where this "Court has indirectly required the states to expend public funds in order to bring public programs into compliance with constitutional guarantees." Brief for Amici Curiae 33. None of these cases is apposite. *Swann* and *Turner* were suits against local officers and entities, who are not covered by the Eleventh Amendment. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 233 (1964). *Reynolds* required legislative reapportionment, which would not necessarily require any expenditure of public funds. *Goldberg* simply enjoined the enforcement of certain regulations, but did not order the adoption of new ones

requiring public expenditures. And in none of these cases was the Eleventh Amendment considered.

Appellees note our argument that *Griffin v. Illinois,* 351 U.S. 12 (1956), and *Douglas v. California,* 372 U.S. 353 (1963), which indirectly required the expenditure of state funds, do not violate the Eleventh Amendment because they were not federal suits, but were decided on direct review of state court judgments. They respond by stating that we advocate basing denial of relief on "a dessicated categorization of forms of action." Brief for the Appellees 30. We find nothing "dessicated" or even particularly perplexing in the distinction between state court actions and federal Civil Rights Act suits. The jurisdiction of the Court below depends solely upon treating this litigation as one arising under the Civil Rights Act. Any attempt at this late date to convert the action into one for habeas corpus relief would throw appellees out of court, since they have failed to exhaust state remedies.

The distinction, for purposes of the Eleventh Amendment, between state and federal actions is vital, and was well stated by this Court in *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459, 470 (1945). The contention of appellees and amici that whatever this Court can do on review of state-court judgments, it can authorize the lower federal courts to do in civil suits against states completely ignores the meaning and purpose of the Amendment—that federal courts have no jurisdiction in suits against states.

We agree with amici and appellees that the Eleventh Amendment does not stand in the way of enforcing the Fourteenth. But it does dictate the appropriate forum, which in this case is plainly not the United State District Court.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the Brief for Appellants, we respectfully submit that the Judgment below should be reversed.

Dated, October 8, 1971.

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